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E-FILED - 3/3/11

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARCOS C. GUILLEN,)
)
Plaintiff,)
)
v.)
)
CORRECTIONAL OFFICER ROCHA, et)
al.,)
)
Defendants.)
_____)

No. C 06-5176 RMW (PR)
ORDER AFTER REMAND
RE-OPENING CASE; ORDER
OF PARTIAL DISMISSAL;
DISMISSAL WITH LEAVE
TO AMEND OR NOTIFY
COURT OF INTENT TO
PROCEED WITH ORIGINAL
COMPLAINT

On August 24, 2006, plaintiff, proceeding pro se, filed a federal civil rights complaint pursuant to 42 U.S.C. § 1983. On July 3, 2008, in its initial screening review, the court dismissed the complaint for failure to exhaust, and entered judgment the same day. On November 22, 2010, the Ninth Circuit vacated the order of dismissal and judgment and remanded, in light of Sapp v. Kimbrell, 623 F.3d 813, 822-23 (9th Cir. 2010) (holding that “improper screening of an inmate’s administrative grievances renders administrative remedies effectively unavailable such that exhaustion is not required under the PLRA”) (internal quotation marks omitted). For the reasons stated below, the court re-opens the case, orders the complaint partially dismissed, and grants plaintiff leave to amend. Alternatively, plaintiff shall file a notice that he intends to proceed only with the cognizable claim discussed below.

1 **DISCUSSION**

2 A. Standard of Review

3 A federal court must conduct a preliminary screening in any case in which a prisoner
4 seeks redress from a governmental entity or officer or employee of a governmental entity. See
5 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss
6 any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or
7 seek monetary relief from a defendant who is immune from such relief. See id. § 1915A(b)(1),
8 (2). Pro se pleadings must, however, be liberally construed. See Balistreri v. Pacifica Police
9 Dep’t, 901 F.2d 696, 699 (9th Cir. 1988).

10 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
11 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that
12 the alleged violation was committed by a person acting under the color of state law. See West v.
13 Atkins, 487 U.S. 42, 48 (1988).

14 B. Plaintiff’s Claims

15 Plaintiff claims that in August 2005, he was waiting to be transferred to Tehachapi State
16 Prison after he finished his time in disciplinary administrative segregation. While he was
17 waiting, he filed two federal civil rights complaints, and complained about his conditions of
18 confinement to prison officials. He argues that once defendants learned about his suits and
19 complaints, they retaliated against him. Liberally construed, plaintiff states a cognizable claim
20 of retaliation.

21 Plaintiff also alleges that he falls under the “Americans with Disabilities Act” (“ADA”),
22 however, he does not support this assertion with any facts to state a cognizable claim for relief.
23 Accordingly, this claim is DISMISSED with leave to amend. If plaintiff can, in good faith, state
24 a cognizable claim under the ADA, he may file an amended complaint within thirty days of the
25 filing date of this order.

26 Plaintiff also states that each day that he is in administrative segregation, it prohibits him
27 from seeing his sick mother, watching television, listening to a radio, and is causing him
28 emotional harm. He argues that these effects may violate the Eighth Amendment. Although the

1 Eighth Amendment protects against cruel and unusual punishment, this does not mean that
2 federal courts can or should interfere whenever prisoners are inconvenienced or suffer de
3 minimis injuries. See, e.g., Hudson v. McMillian, 503 U.S. 1, 9-10 (1992) (Eighth Amendment
4 excludes from constitutional recognition de minimis uses of force); Anderson v. County of Kern,
5 45 F.3d 1310, 1314-15 (9th Cir. 1995) (temporary placement in safety cell that was dirty and
6 smelled bad did not constitute infliction of pain); Hernandez v. Denton, 861 F.2d 1421, 1424
7 (9th Cir. 1988) (allegation that inmate slept without mattress for one night is insufficient to state
8 8th Amendment violation and no amendment can alter that deficiency), judgment vacated on
9 other grounds, 493 U.S. 801 (1989); DeMallory v. Cullen, 855 F.2d 442, 444 (7th Cir. 1988)
10 (correctional officer spitting upon prisoner does not rise to level of constitutional violation);
11 Holloway v. Gunnell, 685 F.2d 150 (5th Cir. 1985) (no claim stated where prisoner forced to
12 spend two days in hot dirty cell with no water); Miles v. Konvalenka, 791 F. Supp. 212 (N.D. Ill.
13 1992). Petitioner's allegations, even liberally construed, are insufficient to state a claim against
14 cruel and unusual punishment. Thus, it is DISMISSED.

15 Accordingly, the court grants plaintiff leave to file an amended complaint **within thirty**
16 **(30) days** of the date this order is filed, to address the deficiency set forth above. In the
17 alternative, within thirty (30) days of the date this order is filed, plaintiff may file a notice with
18 the court stating that he intends to proceed with the cognizable claim in this original complaint.
19 Because an amended complaint completely replaces the original complaint, plaintiff must
20 include in it all the claims he wishes to present. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262
21 (9th Cir. 1992).

22 CONCLUSION

23 For the foregoing reasons, the court hereby orders as follows:

- 24 1. The clerk shall RE-OPEN this case.
- 25 2. Plaintiff shall file an amended complaint **within thirty (30) days** from the date
26 this order is filed. **In the alternative, within thirty (30) days** from the date this order is filed,
27 plaintiff may file a notice with the court stating that he intends to proceed with the cognizable
28 claim as found by the court.

1 An amended complaint must include the caption and civil case number used in this order
2 (C 06-5176 RMW (PR)) and the words "AMENDED COMPLAINT" on the first page. Plaintiff
3 is advised that an amended complaint supersedes the original complaint. "[A] plaintiff waives
4 all causes of action alleged in the original complaint which are not alleged in the amended
5 complaint." London v. Coopers & Lybrand, 644 F.2d 811, 814 (9th Cir. 1981). Defendants not
6 named in an amended complaint are no longer defendants. See Ferdik, 963 F.2d at 1262 (9th
7 Cir. 1992).

8 Plaintiff may not incorporate material from the original complaint, such as supporting
9 documentation or exhibits, by reference. Plaintiff must include all of his claims, including the
10 cognizable claims set forth above, in the amended complaint. **Failure to file an amended
11 complaint or file a notice with the court in compliance with this order within the
12 designated time will result in the court proceeding with the cognizable claim in the original
13 complaint as stated in this order.**

14 3. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the
15 court informed of any change of address by filing a separate paper with the clerk headed "Notice
16 of Change of Address," and must comply with the court's orders in a timely fashion. Failure
17 to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal
18 Rule of Civil Procedure 41(b).

19 IT IS SO ORDERED.

20 DATED: 3/2/11


RONALD M. WHYTE
United States District Judge